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Supreme Court, U.S.
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No. 15-833

IN THE

Supreme Court of the United States

JEFFREY BEARD, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION,

Petitioner,

v.

ANTONIO A. HINOJOSA,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

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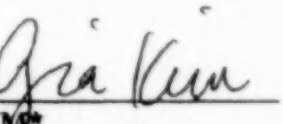
Respondent, by his undersigned counsel, asks leave to file the attached Brief for Respondent in Opposition without prepayment of costs and to proceed in forma pauperis. Respondent was represented by counsel in the Ninth Circuit under the Criminal Justice Act, 18 U.S.C. § 3006A(b).

This motion is brought pursuant to Rule 39.1 of the Rules of the Supreme Court of the United States.

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: February 29, 2016

By: 
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BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that *Ylst*'s "look through" presumption applies when the state court record includes at least one reasoned decision, and that the State failed to adduce sufficient evidence to rebut the presumption in this case.

2. Whether the court of appeals correctly concluded that the statutory elimination of custody credits upon validation as a prison gang member or associate violated the Ex Post Facto Clause, when Respondent committed his offense of conviction and was validated as a prison gang associate before the amendment was enacted.

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INTRODUCTION

Faithfully applying this Court's longstanding precedent in *Ylst v. Nunnemaker*, the court of appeals properly looked through the California Supreme Court's and California Court of Appeal's unexplained denials of habeas relief to the last reasoned opinion, that of the California Superior Court. There it found a procedural decision, not a decision on the merits, and accordingly declined to apply the deferential standards of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Petitioner does not dispute that, as a general matter, *Ylst* remains good law. Instead, Petitioner quibbles with the court of appeals' application of *Ylst*'s correctly stated rule. The court of appeals did not err. But even if it did, a case-specific exercise in error correction does not merit this Court's review, particularly when that analysis turns on details of California habeas procedure that Petitioner never brought to the court of appeals' attention.

The decision does not squarely conflict with other circuits' factbound applications of the Ex Post Facto Clause to changes to different custody credit laws in different states, and the issue arises only rarely. In light of intervening case law, it is unclear whether the California Supreme Court would extend its 1985 decision in *In re Ramirez* to amended Section 2933.6. Any conflict with *Ramirez* will, in any event, have little to no practical impact on prison management, civil liability, or the release date of other prisoners. And, given California's ongoing legislative and administrative efforts to dismantle the segregated housing and credit-earning schemes at issue here, the court of appeals' decision is likely to have limited prospective significance. This Court's intervention is not warranted.

STATEMENT OF THE CASE

I. 2003 CONVICTION AND SENTENCE

On July 17, 2003, Respondent Antonio Hinojosa pleaded guilty in the Superior Court of California, County of Orange, to first-degree robbery, with a firearm enhancement, and participation in criminal street gang activity, and was sentenced to sixteen years in state prison. (ER 289-292.)

II. 2009 GANG VALIDATION AND PLACEMENT IN THE SECURITY HOUSING UNIT ("SHU")

The Security Housing Unit, or SHU, is one of the special housing units in California prisons "designated for extended term programming of inmates not suited for general population." Cal. Code Regs. tit. 15, § 3341.5 (2010).[1] An inmate found guilty of a "serious" offense may be placed in the SHU for a determinate term. *Id.* § 3341.5(c)(2)(B)(1) (2010). Pursuant to regulation, however, a validated prison gang member or associate "is deemed to be a severe threat to the safety of others or the security of the institution and will be placed in a SHU for an *indeterminate* term." *Id.* § 3341.5(c)(2)(A)(2) (2010) (emphasis added).

Hinojosa was validated as a prison gang associate on April 20, 2009. (ER 304.) California regulations define an "associate" as someone who, "based on

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[1] Hinojosa filed his federal habeas petition on June 15, 2012. (ER 262.) Since then, the California regulations dealing with gang validation and SHU placement have been renumbered, relocated, and substantively amended. *See* California Department of Corrections and Rehabilitation, Security Threat Group (STG) Information, http://www.cdcr.ca.gov/stg/ (last visited Feb. 26, 2016) ("Since 2012, CDCR has implemented significant reforms to the way it manages [Security Threat Groups] and validates inmates in the Security Housing Unit (SHU). CDCR's reforms have lessened its reliance on segregated housing for managing validated inmates."). The procedures and terminology set forth here reflect the regulations in place on January 25, 2010, the date amended Section 2933.6 went into effect.

documented evidence, is involved periodically or regularly" with gang associates or members; a "member" is defined as an inmate who has been "accepted into membership" by a gang. Cal. Code Regs. tit. 15, §§ 3378(c)(3), (c)(4) (2010).[2] The evidence underlying Hinojosa's violation consisted of the following items: (1) a reference to Hinojosa's alleged gang moniker in correspondence between a validated Mexican associate and a third party who was not in prison, and Hinojosa's possession of an envelope bearing the name and address of that third party; (2) Hinojosa's address book, which contained the name and inmate number of a validated gang associate; (3) a birthday card bearing a Mexican Mafia symbol; and (4) photographs of Hinojosa's allegedly gang-related tattoos, which were taken on July 25, 2008. (ER 304, 411-422.) The envelope, address book, and birthday card were found during a search of Hinojosa's cell on February 26, 2009. (ER 414, 420, 422.) As a result of his validation, Hinojosa was transferred to the SHU at California State Prison, Corcoran, on September 21, 2009. (ER 301.)

A validated gang member or associate will be considered for "review of inactive status" and release from the SHU "when the inmate has not been identified as having been involved in gang activity for a minimum of six (6) years." Cal. Code Regs. tit. 15, § 3378(e) (2010); *see also id.* § 3341.5(c)(5) (2010) ("The term inactive means that the inmate has not been involved in gang activity for a minimum of six (6) years."); § 3341.5(c)(6) (2010) ("Current activity is defined as, any documented gang activity within the past six (6) years."). In other words, under the regulations

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[2] These definitions were subsequently relocated to Cal. Code Regs. tit. 15, § 3378.2(b).

in place at the time Hinojosa was validated, his possession of the envelope, address book, and birthday card on February 26, 2009 would count as "current" gang activity until February 25, 2015.

A validated inmate may also show that he or she has dropped out of a gang by undergoing a process known as "debriefing." Cal. Code Regs. tit. 15, § 3378.1 (2010). Debriefing involves a two-step process consisting of an interview phase and an observation phase. Cal. Code Regs. tit. 15, § 3378.1(a) (2010). In the interview phase, the inmate must provide staff with "information about the gang's structure, activities and affiliates," as well as "a written autobiography of their gang involvement, which is then verified by staff for completeness and accuracy." Cal. Code Regs. tit. 15, § 3378.1(b) (2010). In the observation phase, inmates are observed for up to twelve months in a housing setting with other inmates undergoing the debriefing process. Cal. Code Regs. tit. 15, § 3378.1(c) (2010). Hinojosa alleged in his petition that debriefing places an inmate in jeopardy of retaliation from gang members and does not ensure release from the SHU or restoration to credit-earning status. (ER 406.)

III. 2010 AMENDMENT TO CALIFORNIA PENAL CODE § 2933.6

Under the version of California Penal Code § 2933.6 in effect at the time of Hinojosa's 2003 conviction and 2009 validation as a gang associate, an inmate placed in SHU was eligible to earn custody credits unless the SHU placement resulted from one of fourteen types of serious misconduct, ranging from murder to intentional destruction of state property during a riot, enumerated in Section

2933.6(b). Cal. Penal Code § 2933.6(a), (b) (2009). SHU placement resulting solely from gang validation did not disqualify an inmate from earning custody credits. *Id.*

Effective January 25, 2010, Section 2933.6 was amended to eliminate custody credits for inmates, including Hinojosa, who had been placed in a SHU upon validation as a gang member or associate. Cal. Penal Code § 2933.6(a) (2010). Under the new legislation, such inmates were placed in zero-credit earning status. (ER 294-295.)

On February 25, 2010, Hinojosa appeared before the prison's Institutional Classification Committee. (ER 305.) In accordance with the regulations defining "current" as "within the past six (6) years," Cal. Code Regs. tit. 15, §§ 3341.5(c)(5), 3341.5(c)(6); 3378(e) (2010), the Committee did not review and update Hinojosa's gang status at that time, because the "most recent gang activity documented" was "not more than six years old." (ER 305.) Instead, the Committee elected to retain Hinojosa in the Corcoran SHU for an indeterminate term "due to gang validation" and placed him in zero-credit earning status as of January 25, 2010 -- the effective date of amended Section 2933.6. (ER 305, 364.)

As a result of the change in law, Hinojosa's minimum release date was extended by exactly a year, from September 27, 2015, to September 27, 2016. (ER 299, 305.) Hinojosa did not forfeit any custody credits earned prior to the statute's effective date of January 25, 2010. (ER 364.)

IV. STATE HABEAS PROCEEDINGS

After exhausting his administrative remedies, Hinojosa filed a habeas corpus petition in Orange County Superior Court on May 30, 2011. (ER 16-91, 307-320.)

Hinojosa presented the ex post facto claim in Ground One of his Superior Court habeas petition. (ER 18.) Acting pro se, he summarized Ground One as follows: "The California Legislation Senate Bill-18, enactment of 1/25/10 to forfeited petitioner's credit earning violated petitioner plea agreement with this court and the ex post facto constitution." (ER 18.) In the body of the petition, he cited both Ex Post Facto Clauses in Article I of the United States Constitution, as well as *Weaver v. Graham*, 450 U.S. 24 (1981), and *Lynce v. Mathis*, 519 U.S. 433 (1997), leading cases on the ex post facto prohibition as applied to custody credits, and he discussed how those authorities made it unconstitutional to apply amended Section 2933.6 to his pre-enactment conduct. (ER 22, 25, 39-46.) Hinojosa also made clear that he was not challenging the underlying prison gang validation in this proceeding, as the validation was the subject of a separate state habeas petition. (ER 21, 34.) In Ground Two, Hinojosa raised due process arguments alleging that the application of amended Section 2933.6 violated his plea agreement. (ER 29, 36, 49-51.)

The Superior Court denied the petition in a reasoned decision on July 8, 2011. Pet. App. 42a-45a. It understood Mr. Hinojosa's petition as presenting two claims. The Superior Court considered "petitioner's first claim of error," generally corresponding to Ground Two of the petition, as arguing that amended Section 2933.6 "violates the terms of petitioner's plea agreement and constitutional right to due process." Pet. App. 43a. It denied the due process claim on the merits in a reasoned decision. Pet. App. 43a-44a.

The Superior Court summarized "petitioner's second claim of error" as follows:

> **The California Department of Corrections and Rehabilitation has unlawfully validated petitioner as a prison gang associate resulting in the retroactive application of recently amended Penal Code § 2933.6 to restrict and/or deny petitioner's eligibility for prison conduct credit in violation of petitioner's constitutional right to due process and the constitutional proscription against ex post facto legislation.**

Pet. App. 43a. It denied this claim "on grounds petitioner has not sought review of his claim of error in the proper judicial venue." Pet. App. 44a. Citing the California Supreme Court's decision in *Griggs v. Superior Court*, 16 Cal. 3d 341, 347 (1976), the Superior Court reasoned that Hinojosa's claim of improper gang validation resulting in the denial of conduct credits "is essentially a challenge to a condition of confinement" that should be entertained in the superior court of confinement (Kings County), not in the superior court of conviction (Orange County). Pet. App. 44a.

Hinojosa then filed an original habeas petition raising the ex post facto claim in the California Court of Appeal on September 2, 2011. (ER 98-179.) The petition was denied without comment on October 11, 2011.[3] (ER 4.)

Following the California Court of Appeal's denial, Hinojosa filed an original habeas petition in the California Supreme Court on December 5, 2011. (ER 180-261.) The California Supreme Court denied the petition without comment on April 11, 2012. Pet. App. 40a.

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[3] Although Petitioner's Appendix correctly reproduces the text of this order, it incorrectly reproduces the filing date as "October 18, 2005." Pet. App. 41a.

V. FEDERAL HABEAS PROCEEDINGS

Hinojosa filed a pro se federal habeas petition on June 15, 2012. (ER 262-340.) As relevant here, the first ground of the federal petition raised the ex post facto claim presented to the California courts. (ER 268-274.)

The magistrate judge filed a report and recommendation on March 28, 2013. Pet. App. 31a-39a. As relevant here, the magistrate judge concluded that the California Superior Court's opinion represented the last reasoned decision for "some" of Hinojosa's claims. Pet. App. 34a. Although the magistrate judge did not explain what he believed to be the Superior Court's basis for denial of the ex post facto claim, it is clear that the magistrate judge treated all of the claims in Hinojosa's federal petition as subject to the deferential standards in 28 U.S.C. § 2254(d), as amended by AEDPA, and recommended denial of the petition. Pet. App. 33a-34a. The district court adopted the findings and recommendation of the magistrate judge and entered a judgment denying relief. Pet. App. 29a-30a.

The court of appeals reversed, with Judge Carlos T. Bea writing for the unanimous panel, which also included Judge Ferdinand F. Fernandez and Judge Raymond C. Fisher. Pet. App. 1a-3a. The court of appeals began by noting that it had rejected a similar ex post facto challenge to amended Section 2933.6 under AEDPA, in *Nevarez v. Barnes*, 749 F.3d 1124 (9th Cir. 2014). Pet. App. 9a. It then proceeded to explain that Section 2254(d) of AEDPA did not apply to Hinojosa's claim because the California Superior Court denied the ex post facto claim on the procedural ground of improper venue, not on the merits. Pet. App. 9a-10a. The court of appeals rejected the State's argument that this Court's decisions in

Harrington v. Richter, 562 U.S. 86 (2011) ("*Richter*"), and *Johnson v. Williams*, __ U.S. __, 133 S. Ct. 1088 (2013), silently abrogated the "look through" presumption adopted in *Ylst v. Nunnemaker*, 501 U.S. 797 (1991). Pet. App. 10a. After looking through to the Superior Court's decision, which rested on a procedural ground, the court of appeals concluded that any presumption that the higher courts' summary denials were on the merits had been rebutted. Pet. App. 10a. Because the State did not raise a procedural default defense, the court of appeals turned to the merits of the ex post facto claim. Pet. App. 10a-11a.

Citing this Court's decision in *Lynce v. Mathis*, 519 U.S. 433, 441 (1997), the court of appeals considered whether amended Section 2933.6 was both retrospective and disadvantageous. Pet. App. 11a-12a. As to retrospectivity, the court of appeals noted that this Court "has instructed that the 'critical question is whether the law changes the legal consequences of acts completed before its effective date.'" Pet. App. 12a (quoting *Weaver v. Graham*, 450 U.S. 24, 31 (1981)). To answer this question, the court of appeals had to determine "which acts" counted for purposes of retrospectivity analysis -- the original criminal conduct resulting in incarceration, as Hinojosa argued, or Hinojosa's prison-gang association, which the State claimed was ongoing. Pet. App. 12a-13a.

On de novo review, the court of appeals concluded that under its precedent in *United States v. Paskow*, 11 F.3d 873 (9th Cir. 1993), and this Court's decision in *Weaver*, the date of the inmate's underlying criminal conduct was the relevant date for ex post facto purposes. Pet. App. 17a. In *Weaver*, this Court held that a Florida

statute reducing the amount of available "gain time," or custody credits, was retrospective even though, on its face, it applied only after its effective date. 450 U.S. at 31. *Paskow* held that an amendment to the federal supervised release statute, 18 U.S.C. § 3583, which imposed a new mandatory minimum revocation sentence, violated the Ex Post Facto Clause as applied to a defendant who was convicted before the amendment but violated supervised release after the amendment. 11 F.3d at 875.[4] Pet. App. 14a-15a. In both cases, the date of the original criminal offense governed the retrospectivity analysis even though, in *Paskow*, the defendant had committed an intervening act of misconduct that subjected him to the new law. Pet. App. 13a-15a (citing *Paskow*, 11 F.3d at 877; *Weaver*, 450 U.S. at 31). The court of appeals reasoned that under *Weaver* and *Paskow*, a prisoner's eligibility for an earlier release is part of his underlying criminal sentence, regardless of the precise mechanism (custody credits, parole) by which that release is brought about; a change in that early-release mechanism thus effectively "changes the legal consequences" of the underlying criminal conduct. Pet. App. 17a (quoting *Weaver*, 450 U.S. at 31). Because Hinojosa committed his offenses of conviction before the change in law, the court of appeals held that amended Section 2933.6 was retrospective as applied to him. Pet. App. 18a.

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[4] As the court of appeals noted, *Paskow*, in turn, relied on this Court's summary affirmance in *Greenfield v. Scafati*, 277 F. Supp. 644, 644-45 (D. Mass. 1967), *aff'd mem.*, 390 U.S. 713 (1968) (per curiam). Pet. App. 14a-15a & n.6. In *Greenfield*, a three-judge district court held that a Massachusetts law providing for forfeiture of good-conduct credits for a violation of parole violated the Ex Post Facto Clause as applied to an inmate who committed his offense before the change in law but violated his parole after the statute went into effect. 277 F. Supp. at 644-46.

The court of appeals further concluded that the amendment to Section 2933.6 disadvantaged Hinojosa by extending his release date by a year. Pet. App. 20a-22a. It rejected the State's argument that, under *California Department of Corrections v. Morales*, 514 U.S. 499 (1995), Hinojosa's risk of an increased sentence was too speculative and attenuated to violate the Ex Post Facto Clause. Pet. App. 21a-22a. The court of appeals pointed out that unlike in *Morales*, which involved a change only to the timing of parole hearings, here the "substantive formula" for awarding custody credits has been changed, to Hinojosa's detriment. Pet. App. 22a. It also addressed the State's argument that Hinojosa was not disadvantaged because he could disaffiliate from the prison gang and resume earning credits. Pet. App. 22a. The court of appeals explained that waiting six years to enter "inactive" status and debriefing were both lengthy procedures, uncertain to result in full restoration of credits, and debriefing was potentially dangerous to boot. Pet. App. 22a. These new conditions placed on Hinojosa's eligibility for custody credits thus disadvantaged him. Pet. App. 23a.

The court of appeals was careful to note that the decision did not prohibit the State from enacting a new statute to punish in-prison misconduct and applying it to inmates whose underlying offense conduct predated the enactment. Pet. App. 23a-24a. Nor did the decision prevent the State from punishing prison misconduct through new administrative disciplinary measures that stop short of extending the sentence, such as segregated housing and loss of privileges, without regard to the date of the inmate's underlying crime. Pet. App. 19a. Under the court of appeals'

decision, only those new laws that retroactively increased prison time would run afoul of ex post facto prohibitions. Pet. App. 19a, 24a.

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS' NARROW AND CORRECT DECISION DOES NOT WARRANT THIS COURT'S REVIEW

A. Petitioner's Request For Error Correction Misconstrues This Court's Precedents And California Law.

Petitioner asks this Court to "correct" the court of appeals' decision to consider the ex post facto claim de novo, rather than under AEDPA's deferential standards. Pet. 11. As his proposed first question presented makes clear, Petitioner would have this Court intervene to settle a narrow disagreement on the operation, *under state law*, of a state trial court's procedural ruling. Pet. i. Petitioner's faint attempts to cast the issue more broadly -- as one of dueling presumptions in *Ylst* and *Richter*, or the general inapplicability of *Ylst* to California habeas decisions -- are foreclosed by this Court's precedents and are therefore unavailing. And contrary to Petitioner's incomplete and misleading description of California law, the state's habeas review procedures actually support, rather than defeat, the court of appeals' application of *Ylst* in this case. Petitioner's request for case-specific error correction lacks merit and should be rejected.

To the extent that Petitioner argues broadly that the court of appeals improperly elevated *Ylst*'s look-through presumption over *Richter*'s presumption of a merits adjudication, that contention is foreclosed. This Court has continued to apply *Ylst* after *Richter*. *See Brumfield v. Cain*, 135 S. Ct. 2269, 2276 (2015). Here, Hinojosa filed a habeas petition at every level of the California courts, and the

California Superior Court issued a reasoned decision on his ex post facto claim. Pet. App. 44a. Richter, on the other hand, filed only one state habeas petition, in the California Supreme Court; that petition was denied in a one-sentence summary order. *Richter*, 562 U.S. at 96. As two Justices of this Court have recently noted, *Richter* did not supersede *Ylst* in cases where a lower state court issued a reasoned decision: "With no reasoned opinion to look through to, the Court [in *Richter*] had no occasion to cast doubt on *Ylst*. To the contrary, the Court cited *Ylst* approvingly in *Richter*, . . . and did so again two years later in *Johnson v. Williams*[.]" *Hittson v. Chatman*, 135 S. Ct. 2126, 2127 (2015) (Ginsburg, J., concurring in denial of certiorari) (citations omitted). "In short, *Richter* instructs that federal habeas courts should continue to 'look through' even nondiscretionary adjudications to determine whether a claim was procedurally defaulted." *Id.* That is precisely what the court of appeals did here.

In the same vein, Petitioner erroneously asserts that the California Supreme Court's decision in *In re Reno*, 55 Cal. 4th 428 (2012), establishes that all of that court's summary denials must be treated as merits decisions for purposes of federal habeas review. Petitioner claims that *Reno* addressed "this specific context," Pet. 14, but it did no such thing. In *Reno*, as in *Richter*, the petitioner had previously filed a state habeas petition only in the California Supreme Court, and not first in any lower court. 55 Cal. 4th at 447. The California Supreme Court denied that first habeas petition summarily. *Id.* In *Reno*, the California Supreme Court

explained that its previous summary denial was on the merits.[5] *Id.* But, as in *Richter*, there were no reasoned opinions by lower courts to look through to. *Reno* therefore does not speak to the issue presented in this case.

Moreover, California's original writ system for habeas corpus petitions does not make *Ylst* inapplicable, because *Ylst* itself involved looking through *four* summary denials of California original state habeas petitions to the last reasoned decision on a constitutional claim. 501 U.S. at 805-06. That last reasoned decision had been issued on direct appeal and imposed a procedural bar. *Id.* at 806. In *Ylst*, the Ninth Circuit had ruled that the California Supreme Court's "silent denial" of a state habeas petition constituted a decision on the merits that "lifted the procedural bar" imposed in the last reasoned decision, *id.* at 801 -- essentially the same argument Petitioner advances in this case. Pet. 12-16. This Court reversed and established the following presumption for determining the basis for a state court's denial of a claim: "Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." *Ylst*, 501 U.S. at 803. This Court added, "where, as here, the last reasoned opinion on the claim explicitly imposes a

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[5] Both cases cited in *Reno* for this proposition involved petitioners who filed only in the California Supreme Court and received a summary denial there. 55 Cal. 4th at 447 (citing *In re Clark*, 5 Cal. 4th 750, 760-61 (1993); *Crittenden v. Ayers*, 624 F.3d 943, 949, 960 (9th Cir. 2010)). As distinguished from this case, *Reno*, *Clark*, and *Crittenden* are capital cases, a fact which explains why the habeas petitions were filed directly in the California Supreme Court, and not first in any lower court. *Reno*, 55 Cal. 4th at 446; *Clark*, 5 Cal. 4th at 759; *Crittenden*, 624 F.3d at 947. In California, cases in which a death sentence is imposed are automatically appealed to the California Supreme Court. *See People v. Massie*, 19 Cal. 4th 550, 562 (1998); Cal. Penal Code § 1239(b). If the judgment is affirmed on direct appeal, the defendant may further challenge the judgment by filing a habeas petition directly in the California Supreme Court. *Reno*, 55 Cal. 4th at 442.

procedural default, we will presume that a later decision rejecting the claim did not silently disregard that bar and consider the merits." *Id.* *Ylst*'s holding directly controls the present case.

Crucially, in formulating this presumption, this Court knew that the "later unexplained orders" in *Ylst* arose from state habeas petitions invoking the "original jurisdiction," and not the appellate jurisdiction, of the California Court of Appeal and the California Supreme Court; it took care to note that fact for each petition. *Id.* at 800. Nevertheless, this Court looked through two summary denials by the California Supreme Court, one summary denial by the California Court of Appeal, and one summary denial by the California Superior Court before settling on the California Court of Appeal's opinion on direct review as the "last *explained* state-court judgment" on the constitutional claim. *Id.* at 805-06. Because that opinion imposed a procedural bar, and the habeas petitioner had not carried his burden of adducing "strong evidence" to overcome the presumption, review of the claim was procedurally defaulted unless the habeas petitioner could show cause and prejudice for the default. *Id.* at 806. Although the roles are reversed here, and it is the State who bears the burden of rebutting the "look through," the *Ylst* presumption works in the same way.[6] The *Ylst* presumption is not alien to the California courts, with their original habeas jurisdiction; to the contrary, this Court created the *Ylst* presumption with California's collateral review structure in mind.

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[6] The roles are reversed because the State did not argue procedural default at any stage of the proceedings, and the court of appeals found any procedural default defense to be waived. Pet. App. 11a.

More generally, this Court has rejected claims that California's "original writ" system is exceptional for purposes of federal habeas review. In *Carey v. Saffold*, 536 U.S. 214 (2002) ("*Saffold*"), this Court acknowledged that California's collateral review system differed from that of other states "in that it does not require, technically speaking, appellate review of a lower court determination. Instead it contemplates that a prisoner will file a new 'original' habeas petition." *Id.* at 221. But it denied that this difference was material for purposes of statutory tolling under 28 U.S.C. § 2244(d)(2):

> California's "original writ" system, however, is not as special in practice as its terminology might suggest. As interpreted by the courts, California's habeas rules lead a prisoner ordinarily to file a petition in a lower court first. *In re Ramirez*, 89 Cal.App.4th 1312, 1316, 108 Cal.Rptr.2d 229, 232 (2001) (appellate court "has discretion to refuse to issue the writ . . . on the ground that application has not [first] been made . . . in a lower court");. . . . At the same time, a prisoner who files that same petition in a higher, reviewing court will find that he can obtain the basic appellate review that he seeks, even though it is dubbed an "original" petition. See *In re Resendiz*, 25 Cal.4th 230, 250, 105 Cal.Rptr.2d 341, 19 P.3d 1171, 1184 (2001) (reviewing court grants substantial deference to lower court's factual findings). Thus, typically a prisoner will seek habeas review in a lower court and later seek appellate review in a higher court[.]

Id. at 222. In short, this Court concluded that California's "'original writ' system functions like the 'appeal' systems of . . . other States." *Id.* at 225. This Court's reasoning in *Saffold* defeats Petitioner's argument that *Ylst*'s look-through doctrine does not apply to California's "original writ" system. The California authorities discussed in *Saffold* show that an original habeas petition filed in the California

Court of Appeal or California Supreme Court does not initiate a completely independent proceeding, unencumbered by any consideration of, or deference to, the Superior Court's reasoning or findings.

While it is true that the California Supreme Court's original habeas jurisdiction extends to the entire State, it does not necessarily follow, as Petitioner asserts, that the California Supreme Court could not possibly have based its denial on the Superior Court's conclusion that Hinojosa had filed in the wrong trial court. Contrary to Petitioner's suggestion, Pet. 10, the California Supreme Court's statewide habeas jurisdiction does not distinguish it from the lower courts. All California courts have statewide jurisdiction in habeas cases.[7] *In re Roberts*, 36 Cal. 4th 575, 582 (2005). Under California law, "both trial and appellate courts have jurisdiction over habeas corpus petitions, but a reviewing court has discretion to deny without prejudice a habeas corpus petition that was not filed first in a *proper* lower court." *In re Steele*, 32 Cal. 4th 682, 692 (2004) (emphasis added); *see also People v. Superior Court (Jimenez)*, 28 Cal. 4th 798, 806 n.3 (2002) ("We note that the Court of Appeal does not lack *jurisdiction* over the writ proceeding (Cal. Const., art. VI, § 10), although normally it has discretion to deny a petition that was not filed first in a proper lower court"); 6 B. Witkin & N. Epstein, California Criminal Law, Criminal Writs § 24, p. 629 (4th ed. 2012) ("Even though the appellate court has constitutional jurisdiction to grant habeas corpus . . ., it has

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[7] In fact, the Superior Court itself recognized that it had jurisdiction to adjudicate Hinojosa's case on the merits, as well as discretion not to do so. Pet. App. 44a ("'Although any superior court has jurisdiction to entertain and adjudicate a petition for writ of habeas corpus, it does not follow that it should do so in all instances.'").

discretion to refuse to exercise that jurisdiction, and will normally do so, until the petitioner has unsuccessfully applied for the writ in the lower court of the county of detention.") The details of California law demonstrate that it was not only possible that the California Supreme Court's summary denial was based on Hinojosa's presumed failure to file in the wrong trial court; it was probable, in keeping with the California appellate courts' normal exercise of their discretion in habeas cases.

At bottom, Petitioner's quarrel with the court of appeals' opinion amounts to a case-specific disagreement regarding the details of California habeas procedure. Pet. 10 ("In the circumstances of this case, . . . reliance on *Ylst* makes no sense at all."); Pet. 15 ("There was no basis in this case for the court to rely on a look-through under *Ylst* . . . ."). But, despite his claim that his position is supported by "straightforward California procedural and substantive law," Petitioner musters no authority whatsoever for his claim that the California Supreme Court could not have denied Hinojosa's ex post facto challenge on procedural grounds. Pet. 14-15. Petitioner's meritless plea for error correction is unworthy of this Court's review.

B. Petitioner Did Not Press His *Ylst* Argument In The Court Of Appeals.

This case also presents a poor vehicle for certiorari because Petitioner's claim of error is belated, as well as meritless and limited to the specific facts of this case. *See United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001) (declining to "allow a petitioner to assert new substantive arguments attacking, rather than defending, the judgment when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it"). In his opening brief in the

court of appeals, Hinojosa argued that the California courts' denial of his habeas petition should be reviewed de novo, because the last reasoned state court decision, that of the Superior Court, either misconstrued his ex post facto claim or erroneously denied the claim on the procedural ground of improper venue, not on the merits. Resp. App. 2a-8a. In the answering brief, Petitioner contended that the Superior Court denied the ex post facto claim on the merits, in the course of analyzing a different claim involving an alleged violation of Hinojosa's plea agreement. Resp. App. 13a. That is, Petitioner agreed that the Superior Court's decision was the operative decision for purposes of federal habeas review, but took issue with Hinojosa's characterization of the Superior Court's decision as a procedural ruling, as opposed to a denial on the merits of the ex post facto claim. Resp. App. 12a-14a. Petitioner affirmatively asked the court of appeals to look through to the Superior Court's decision; now he claims that the decision to look through "makes no legal or logical sense." Pet. 10.

At oral argument, when asked directly about the last reasoned state court decision, Petitioner took a new tack.[8] Reversing course, Petitioner conceded that the Superior Court's decision rested on a procedural ground (9:26-9:36) and asked the court of appeals not to look through to the Superior Court's decision. For the first time, Petitioner argued that in light of California's original writ system for habeas petitions and this Court's decisions in *Richter* and *Cullen v. Pinholster*, 563

[8] All time-stamp references in this paragraph are to the video recording of oral argument in the court of appeals. *See* https://www.youtube.com/watch?v=nEZL67YLZJU.

U.S. 170 (2011), the California Supreme Court's summary denial of Hinojosa's habeas petition must be presumed a denial on the merits. (9:10-10:48.)

Petitioner faults the court of appeals for overlooking principles of state law that bear on the question of whether AEDPA deference applies in this case. Pet. 9-16. In essence, Petitioner argues that these state-law principles represent "*strong* evidence" that *Ylst*'s "look through" presumption, as applied in this specific case, is wrong. *Ylst*, 501 U.S. at 805 (emphasis in original). But, until oral argument, Petitioner himself failed to notice those aspects of California law that he now claims are "straightforward" and obvious. Pet. 14. It goes without saying that an argument not raised in the district court or in appellate briefing, and first touched on at oral argument, hardly constitutes "strong evidence" of anything. Because Petitioner did not press his *Ylst* argument until oral argument (and only glancingly then), and the evidence is insufficient to carry Petitioner's heavy burden of rebuttal in any event, this Court should deny the petition for certiorari.

C. This Case Is A Poor Vehicle For Resolving The *Ylst* Issue Because It Is Not Outcome-Determinative.

Even if the court of appeals committed a case-specific error in applying *Ylst* to the facts of this case, this case does not merit this Court's attention because reversal on that basis would not affect the outcome.

In the court of appeal, Hinojosa argued that AEDPA did not apply for a second, independent reason: the California Superior Court misconstrued his ex post facto claim as challenging the lawfulness of his underlying validation as a prison gang associate, as distinguished from amended Section 2933.6's ex post facto effect

on his sentence regardless of whether the earlier gang validation was proper. Resp. App. 5a-6a. Petitioner evidently shared this understanding of the Superior Court's decision, which it described in its appellate brief as follows: "The court also ruled that as to the *claim of error in validating him as a gang member*, Hinojosa did not avail himself of the relief he could have by filing a habeas petition in the county where he was being held." Resp. App. 10a-11a, emphasis added. The Superior Court's mistaken understanding of the claim explains why it erroneously treated Hinojosa's challenge to his sentence as "essentially a challenge to a condition of confinement." Pet. App. 44a.

When a state court rejects a federal constitutional claim fairly presented to it out of "sheer inadvertence," the resulting decision is not an adjudication on the merits. *Johnson v. Williams*, 133 S. Ct. 1088, 1097 (2013); *see also Henderson v. Cockrell*, 333 F.3d 592, 600-01 (5th Cir. 2003) (holding that AEDPA's standards of review do not apply where state courts "misconstrued" petitioner's claim and "did not address . . . actual claim"); *Davis v. Sec'y for Dep't. of Corr.*, 341 F.3d 1310, 1313 (11th Cir. 2003) (per curiam) (same); *Appel v. Horn*, 250 F.3d 203, 210-12 (3d Cir. 2001) (reviewing de novo where state court erroneously "recharacterized" claim). Hinojosa made clear that he was not challenging the underlying gang validation in the Superior Court proceeding. (ER 34.) For this entirely separate reason, "the evidence leads very clearly to the conclusion that a federal claim was inadvertently overlooked in state court," and AEDPA's deferential standard of review should not apply. *Johnson*, 133 S. Ct. at 1097.

In addition, the court of appeals' ex post facto holding is correct regardless of the standard of review. The Fifth Circuit's recent decision in *Price v. Warden*, 785 F.3d 1039 (5th Cir. 2015), confirms that the court of appeals properly granted relief to Hinojosa even if AEDPA applies. In *Price*, the Fifth Circuit considered a 1997 amendment to Louisiana's good-time credit statute that required a parole violator to forfeit all good-time credit earned; prior to the amendment, the forfeiture was limited to 180 days. *Id.* at 1040. Price committed his underlying crime before the amendment, but violated parole in 2003, after the amendment. *Id.* Price not only knew he was subject to credit forfeiture if he violated parole; he expressly agreed to that condition. *Id.* at 1043.

Applying AEDPA, the Fifth Circuit held that the forfeiture of Price's good-time credits upon parole revocation violated the Ex Post Facto Clause, and that the state court's judgment was not just erroneous, but contrary to clearly established federal law. *Id.* at 1043. The Fifth Circuit identified this Court's summary affirmance in *Greenfield v. Scafati*, 277 F. Supp. 644 (D. Mass. 1967), *aff'd mem.*, 390 U.S. 713 (1968) (per curiam), as controlling precedent on the question of credit forfeiture resulting from intervening misconduct: "By summarily affirming in *Greenfield*, the [Supreme] Court necessarily held that a good-time forfeiture law enacted after a prisoner's sentencing is retrospective, even if forfeiture is triggered by the parolee's post-enactment conduct." *Id.* at 1042-43. The Fifth Circuit therefore held that the amended Louisiana statute could not constitutionally be applied to an inmate "whose crime occurred before its effective date." *Id.* at 1040.

Price demonstrates that the court of appeals properly granted relief to Hinojosa even if it applied the wrong standard of review. This Court's intervention is not needed to correct a decision that reached the right result.

II. THERE IS NO SERIOUS CONFLICT ON THE EX POST FACTO ISSUE, AND THE ISSUE RECURS INFREQUENTLY.

This Court need not intervene to clarify an ex post facto issue that arises in the federal courts, by Petitioner's count, approximately once a decade. The Second and Fourth Circuit cases relied on by Petitioner are highly factbound, as they turn on the specific statutory schemes for earning credits in other states and the timing and nature of the prison misconduct involved. The California Supreme Court decision relied on by Petitioner, *In re Ramirez*, has been called into question over the past thirty years, and it is unclear whether the California Supreme Court would extend it to these facts. In any event, because of AEDPA and the procedural default doctrine, Hinojosa may be the only inmate to benefit directly from the court of appeals' decision. As such, there is no real-world conflict between the California Supreme Court and the Ninth Circuit on the ex post facto question.

A. Any Split In The Federal Courts Of Appeal Is Shallow, Factbound, And Outdated.

Petitioner identifies only two federal decisions, and none from the last fifteen years, with which the court of appeals' decision supposedly conflicts. Pet. 23-25. Because the decisions in those cases depend in large part on the peculiar features of the state credit-earning schemes at issue and the timing of the prison misconduct, they cannot be divorced from their specific facts. Further, it is telling that Petitioner points to no conflicting case postdating this Court's decision in *Johnson v.*

United States, 529 U.S. 694 (2000), which clarified that penalties for postconviction misconduct must be attributed to a defendant's original offense, and not treated as punishment for the misconduct itself. *Id.* at 699-700.

The Second Circuit's decision in *Abed v. Armstrong*, 209 F.3d 63 (2d Cir. 2000), is distinguishable because it turned on the discretionary nature of the Connecticut good time credit statute. The Second Circuit noted that the Connecticut statute, which provided that inmates "may" earn credit for good conduct, made the award of credits "a discretionary matter." *Id.* at 66. The Second Circuit therefore concluded that a Connecticut prison administrative directive preventing prison gang members from earning statutory good time credit did not disadvantage Abed because no firm entitlement to good time credit existed in the first place. *Id.* The analogous California statute, by contrast, is phrased in mandatory terms: "For every six months of continuous incarceration, a prisoner *shall* be awarded credit reductions from his or her term of confinement of six months. A lesser amount of credit based on this ratio *shall* be awarded for any lesser period of incarceration." Cal. Penal Code § 2933(b) (emphases added). Unlike in *Abed*, here there is no question that amended Section 2933.6 tangibly disadvantaged Hinojosa by extending his minimum release date.

Briefly, the Second Circuit also reasoned that the administrative directive was not retrospective as applied to Abed, who was classified as a prison gang member after the administrative directive went into effect. *Abed*, 209 F.3d at 66. Hinojosa, however, was validated as a prison gang associate before Section 2933.6

was amended, and all of the evidence of gang association predated the change in the law. Although the Ninth Circuit did not rely on this fact in finding amended Section 2933.6 retrospective, it clearly distinguishes this case from *Abed*.

Nor is there any conflict with the Fourth Circuit's decision in *Ewell v. Murray*, 11 F.3d 482 (4th Cir. 1993), which dealt with a statute that was not penal in nature. In 1990, the state of Virginia enacted a statute establishing a DNA bank and requiring incarcerated felons to provide a blood sample for the bank prior to release. *Jones v. Murray*, 962 F.2d 302, 308-09 (4th Cir. 1992). The Fourth Circuit held in *Jones* that the DNA requirement, standing alone, was "not penal" and therefore could not violate the Ex Post Facto Clause. *Id.* at 309. It then concluded that violators of the DNA requirement could be "administratively punished" for failing to comply. *Id.* Relying on its en banc decision in *Gaston v. Taylor*, 946 F.2d 340, 343 (4th Cir. 1991) (en banc), the Fourth Circuit characterized the DNA requirement as a "reasonable prison regulation[]" and deemed any subsequent punishment resulting from noncompliance as "part of the sentence of every prisoner," not unlike changes in location, variations of routine, changes in condition of confinement, and denials of privileges. *Jones*, 962 F.2d at 309-10.

While *Jones* was being litigated, the Virginia Department of Corrections adopted regulations that "punished" an inmate's refusal to provide a blood sample. *Ewell v. Murray*, 11 F.3d 482, 484 (4th Cir. 1993). One of the new regulations imposed a penalty of the loss of 90 days of good conduct time for a first refusal, 180 days for a second refusal, and all accumulated good conduct time for subsequent

refusals. *Id.* at 484-85. Two facts were critical to the Fourth Circuit's determination that application of the new regulation to all later refusals did not violate the Ex Post Facto Clause. First, the Fourth Circuit emphasized that the DNA bank statute is "not penal in nature." *Id.* at 485; *see also id.* at 487. It also underscored the fact that Virginia's "good conduct allowance system itself," established by statute, "was not amended during the applicable periods here. The rate of good conduct time allowed and the structure of the system have remained constant." *Id.* at 486. In the Fourth Circuit's view, the unchanged *statutory* credit scheme distinguished *Ewell* from this Court's decision in *Weaver*. *Id.* at 487. Given these specific aspects of Virginia's statutory and regulatory framework, the Fourth Circuit viewed itself as deciding a "narrow question." *Id.* at 486.

Ewell's factual underpinnings distinguish it from this case. As Petitioner points out, the amendment to Section 2933.6 was enacted as part of a "broad criminal justice reform measure." Pet. 5. Petitioner does not dispute that amended Section 2933.6, which can be found in that chapter of the California Penal Code pertaining to "Execution of Sentences of Imprisonment," is "penal" in nature. *See* Cal. Penal Code, pt. 3, tit. 1, ch. 7. And there is no question that, unlike in *Ewell* (and *Abed*), the amendment to Section 2933.6 changed California's statutory custody credits system itself, not merely regulations administering the statutory scheme. Section 2933.6 is located in that article of the Penal Code titled "Credit on Term of Imprisonment," which sets forth the rate and structure of the various credits available to California inmates. Cal. Penal Code §§2930-2935.

Further, *Ewell* rests on the outdated premise that the punishment for refusing to provide a blood sample "does not add punishment for the original crime for which the inmate was incarcerated," as it punishes only *subsequent* misconduct. 11 F.3d at 486. This Court rejected this line of reasoning in *Johnson*, where it held that penalties imposed for a violation of federal supervised release are "part of the penalty for the initial offense," as opposed to "punishment for the violation of the conditions of supervised release." 529 U.S. at 700. Adopting this understanding of supervised release allowed this Court to avoid the "serious constitutional questions" that would arise if postrevocation penalties were construed as punishment for the violation conduct, including the fact that "the violative conduct need not be criminal and need only be found by a judge under a preponderance of the evidence standard, not by a jury beyond a reasonable doubt." *Id.* In light of the Fourth Circuit's reliance on this discredited distinction, it is unsurprising that *Ewell*'s ex post facto holding has not been cited in a reported appellate case in more than twenty years.

Although *Johnson* involved federal supervised release, and not loss of custody credits, the same principle applies here. Like the hypothetical violation conduct in *Johnson*, the actual conduct resulting in Hinojosa's loss of custody credits -- mere possession of an envelope, address book, birthday card, and tattoos evincing gang association -- is not criminal in itself. *See People v. Castenada*, 23 Cal. 4th 743, 745 (2000) (conviction under Cal. Penal Code § 186.22, criminal street gang activity, requires "involvement with a criminal street gang that is more than nominal or passive"). And the fact of gang validation underlying Hinojosa's ineligibility for

credits was found by a prison committee, not by a jury beyond a reasonable doubt. Characterizing Hinojosa's additional year of imprisonment as punishment for intervening misconduct, when that misconduct amounts to a status offense, creates more constitutional problems for Petitioner than it solves.

B. There Is No Real-World Conflict With The California Supreme Court.

The California Supreme Court's decision in *In re Ramirez*, 39 Cal. 3d 931 (1985), which predates *Johnson*, suffers from the same misunderstanding of the relevant date for purposes of retrospectivity analysis as *Ewell*. *Ramirez* involved 1982 amendments to California's statutory scheme for sentence reduction credits, which generally expanded the number of acts resulting in credit forfeiture, increased the number of credits subject to forfeiture for misconduct, provided for loss of participation credits as well as good behavior credits, and eliminated limits on credits subject to forfeiture. *Id.* at 933. Although it concluded that the amendments were disadvantageous for ex post facto purposes, the California Supreme Court flatly rejected the habeas petitioner's argument that the amendments were retrospective because they related to the original offense of conviction, not to the post-amendment prison misconduct:

> It is true that the 1982 amendments apply to petitioner only because he is a prisoner and that he is a prisoner only because of an act committed before the 1982 amendments. Nonetheless, the increased sanctions are imposed solely because of petitioner's prison misconduct occurring after the 1982 amendments became effective. In other words, the 1982 amendments apply only to events occurring *after* their enactment. . . . Accordingly, the 1982 amendments . . . do not relate to petitioner's original crime and are not retrospective under *Weaver*.

Id. at 936-37. Again, this is the same logic rejected by this Court in *Johnson*, which avoided thorny constitutional questions by attributing post-revocation penalties to the original offense of conviction, rather than treating them as punishment for subsequent misconduct. 529 U.S. at 700.

Indeed, the California Supreme Court and California Court of Appeal have recognized *Johnson*'s effect on *Ramirez*'s ex post facto analysis. In *People v. Callejas*, 85 Cal. App. 4th 667 (Cal. Ct. App. 2000), a parolee challenged a parole revocation fine imposed pursuant to a statute enacted after the parolee committed the underlying offense. *Id.* at 669. The California Court of Appeal initially filed an opinion concluding that there was no ex post facto violation. *Id.* at 675-76. The California Supreme Court granted a petition for review, vacated the Court of Appeal's opinion, and ordered reconsideration in light of this Court's decision in *Johnson*. *People v. Callejas*, 2 P.3d 1064 (Cal. 2000). Concluding that there was "no principled way of distinguishing *Johnson* from the present case," the California Court of Appeal departed from *Ramirez* and issued an amended opinion holding that application of the parole revocation fine to a defendant whose underlying crime preceded the enactment of the fine statute would violate ex post facto principles. *Callejas*, 85 Cal. App. 4th at 674-78.

The California Court of Appeal also limited *Ramirez*'s reach in *In re Lomax*, 66 Cal. App. 4th 639 (Cal. Ct. App. 1998). In 1995, California Penal Code § 2933 was amended to grant discretion to the Director of Corrections to decline to restore credits forfeited as a result of certain serious disciplinary infractions. *Lomax*, 66

Cal. App. 4th at 643. Before the 1995 amendment, Section 2933 had required restoration of forfeited credits in most cases, provided the inmate completed a certain period free of discipline. *Id.* In 1996, in response to the statutory grant of discretion, the Department of Corrections revised its regulations to prohibit, for the first time, the restoration of conduct credits forfeited for certain categories of disciplinary infractions. *Id.* at 641, 643. In *Lomax*, the California Court of Appeal departed from *Ramirez* and held that the revised credit-forfeiture regulations violated the Ex Post Facto Clause for prisoners who committed their misconduct prior to the amendments. *Id.* at 643-48; *see also In re Mikhail*, 70 Cal. App. 4th 333, 336 (Cal. Ct. App. 1999) (same). The California Court of Appeal rejected the State's suggestion that *Ramirez* stood for the sweeping proposition that "changes in sanctions for misconduct do not relate to the petitioner's original crime and thus are not retrospective under *Weaver v. Graham*[.]" *In re Lomax*, 66 Cal. App. 4th at 644. Specifically, the *Lomax* court concluded that *Ramirez*'s broad pronouncements must be interpreted in light of this Court's intervening decision in *Lynce v. Mathis*, 519 U.S. 433 (1997). *In re Lomax*, 66 Cal. App. 4th at 644.

In *Lomax*, the California Court of Appeal relied on *Lynce*'s emphasis on the "objective effect" of an amendment, rather than the legislative purpose behind the change. *Id.* at 646-48. Under an analysis focusing on the objective consequences of the change in law, the California Court of Appeal reasoned, "[t]he fact that prison misconduct is at issue does not serve to distinguish this case from [*Weaver v.*] *Graham or Lynce* for purposes of ex post facto analysis." *Id.* at 647. The *Lomax*

Court also regarded *Lynce* as foreclosing the State's argument that custody credits were unrelated to the penalty for the original crime. *Id.* at 646-47. Because it is unclear whether the California Supreme Court would extend its thirty-year-old decision in *Ramirez* to amended Section 2933.6, especially in light of this Court's intervening decisions in *Johnson* and *Lynce*, *Ramirez* does not squarely conflict with the court of appeals' decision in this case.

The active nature of the misconduct at issue in *Ramirez* also differs dramatically from the status offense of gang association. In *Ramirez*, the inmate lost custody credits for the discrete act of altering the paperwork relating to a television set. 39 Cal. 3d at 934. Against this factual backdrop, the California Supreme Court reasoned that "[i]f any aspect of prison life is unconnected to a prisoner's original crime, it would seem to be the sanctions for his misconduct while in prison." 39 Cal. 3d at 936. But that is not so when the misconduct takes the form of gang association: Hinojosa was convicted of participation in criminal street gang activity, in violation of California Penal Code § 186.22(a), a crime that is in fact closely connected to a subsequent finding of gang association. Further, the California Supreme Court stressed that Ramirez had received "fair warning" of the increased sanctions and, nevertheless, chose to alter his sentence "by his own action." *Id.* at 938, 937. Hinojosa, in contrast, was validated as a gang associate before the change in law, and was not on notice that validation would lengthen his sentence. And Hinojosa took no "action" after the change in law. Rather, purely by operation of state law, his status as an associate was considered a continuing

offense for six years. Cal. Code Regs. tit. 15, § 3341.5(c)(6) (2010). *Ramirez* did not contemplate prison misconduct that approaches a status offense.

As a practical matter, the operation of AEDPA blunts any conflict between *Ramirez* and the court of appeals' decision in this case. The Ninth Circuit has held that under AEDPA, the California courts' denial of an ex post facto claim based on the 2010 amendment to Section 2933.6 is not contrary to, or an unreasonable application of, clearly established federal law. *Nevarez*, 749 F.3d at 1128-29. Petitioner fails to mention that the vast majority of Section 2254 petitions filed by California prisoners regarding amended Section 2933.6 will be subject to Section 2254(d), unless the California courts adjudicating those claims decide the case on procedural grounds, *and* Petitioner is unwilling or unable to show that the procedural default bars federal review, as occurred here. For those habeas petitioners filing under AEDPA in the Ninth Circuit, *Nevarez* is controlling. *See, e.g.*, *Porras v. Biter*, 585 Fed. Appx. 675 (9th Cir. 2014) (denying ex post facto challenge to amended Section 2933.6 based on *Nevarez*); *Leal v. Ducart*, 584 Fed. Appx. 861 (9th Cir. 2014) (same); *Garcia v. Barnes*, 584 Fed. Appx. 562 (9th Cir. 2014) (same).

In short, this is not a case in which a state actor is subject to grave uncertainty as to which constitutional rule will govern its conduct on a day-to-day basis. *Cf. United States v. Knights*, 534 U.S. 112, 116 (2001) (noting conflict between California Supreme Court and Ninth Circuit on constitutionality of investigative searches pursuant to common California probation condition). There

is no reason for this Court to grant certiorari to review an idiosyncratic and isolated case in which the state courts decided a case on procedural grounds, no procedural default defense was raised in federal court, and a single habeas petitioner received relief as a result.

III. PETITIONER OVERSTATES THE DECISION'S IMPACT ON PRISON ADMINISTRATION.

First, the court of appeals' decision does not place California prison authorities in an untenable situation with respect to the issuance of custody credits. Pet. 27. This Court has made clear that, when it comes to AEDPA, "disagreeing with the lower federal courts is not the same as ignoring federal law." *Johnson v. Williams*, 133 S. Ct. 1088, 1098 (2013). And while Petitioner suggests that the court of appeals' decision "could control the result in future federal civil litigation," Pet. 27, this Court's Section 1983 doctrine proves otherwise. This Court has held that "when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus[,]" not an action under 42 U.S.C. § 1983. *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973). Further, a California inmate will not be able to recover monetary damages in federal court for an alleged ex post facto violation because a judgment in his favor "would necessarily imply the invalidity of his . . . sentence," and therefore is not cognizable under Section 1983 "unless the plaintiff can demonstrate that the . . . sentence has already been invalidated." *Heck*

v. Humphrey, 512 U.S. 477, 487 (1994). Because of AEDPA and *Nevarez*, the typical inmate plaintiff will not be able to make this showing of prior invalidation.

Second, the court of appeals' decision does not hinder States' ability to deter serious in-prison misconduct. Noting that Section 2933.6 was not enacted until 1992, Petitioner raises the specter of being unable to impose credit limitations on inmates who committed their underlying crimes prior to 1992 and then engage in an enumerated act of prison misconduct, such as murder, assault, battery, rape, and hostage-taking. Pet. 28. But of course, all of these acts are criminally punishable, and no ex post facto principles prevent the state from initiating a new criminal prosecution to punish and deter such conduct. The maximum SHU term for murder of a non-inmate is 60 months, with an "expected" term of 48 months. Cal. Code Regs. tit. 15, § 3341.9(e)(1)(A). The prospect of losing credit-earning status for four or five years pales in comparison to the criminal penalties for murder -- ranging from death if special circumstances exist to 15 years to life for second-degree murder, Cal. Penal Code § 190(a) -- and it is absurd to suggest that the court of appeals' decision will permit prison misconduct of this magnitude to go unpunished.

Nor does the court of appeals' decision prevent the State from effectively responding to new categories of prison misconduct, such as cell phone usage. California law has long criminalized possession of contraband, such as weapons and drugs, by prison inmates. *See* Cal. Penal Code § 4502 (felony possession of deadly weapon in penal institution); § 4573.8 (felony possession of drugs or paraphernalia in prison or jail). California law also prescribes criminal penalties for specified acts

of assault, battery, hostage-taking, and criminal damage committed inside prison walls, in addition to laws of general applicability that may cover such conduct. *See* Cal. Penal Code § 4500 (assault by life prisoner with deadly weapon); § 4501 (assault with deadly weapon by prisoner not serving life); § 4501.1 (battery upon state prison officer or employee); § 4503 (holding hostage within prison), § 4600 (destroying prison property). Since 2008, possession of an unauthorized cell phone in a California *jail* has been punishable as a misdemeanor. Cal. Penal Code § 4575(a). The court of appeals' decision does not hinder the State's ability to prosecute an inmate under any of these statutes, without regard to the date on which the inmate committed his underlying crime.

The State complains that the court of appeals' decision will diminish the effectiveness of Section 4576, the 2011 law pertaining to cell phones in *prison*. Pet. 29-30. But Section 4576, uniquely among all California "offenses by prisoners," Cal. Penal Code §§ 4500-4576, establishes a two-tier system of punishment: while possession of a cell phone with intent to deliver the phone to an inmate is a misdemeanor punishable by up to six months in jail, Cal. Penal Code § 4576(a), possession of a cell phone by an inmate simply subjects the inmate to losing up to 90 days of conduct credits, *id.* § 4576(c). Section 4576(a) thus initiates a new criminal misdemeanor prosecution, free of ex post facto problems as long as the cell phone possession occurred after the statute's effective date. The State may well prefer Section 4576(c)'s credit forfeiture provision as an expedient way to punish and deter cell phone possession by inmates, without the procedural protections of a jury trial

and proof beyond a reasonable doubt. But there's a constitutional catch to such expedience· the Ex Post Facto Clause prohibits application of the increased credit-forfeiture provision to inmates who committed their offenses of conviction before the statute was enacted.

Third, Petitioner argues that it is unworkable to run a prison in which some inmates earn or forfeit different amounts of custody credit for the same misconduct. Pet. 28-29. But California already operates a correctional system along these lines. As a result of *Lomax* and *Mikhail*, discussed above, *see supra* at pp. 29-31, some inmates could eventually have their forfeited conduct credits restored while others, who committed the same misconduct, would not be eligible for restoration. Contrary to the California Supreme Court's warning in *Ramirez* that such a system was "simply infeasible" and detrimental to prison order, 39 Cal. 3d at 937, the sky did not fall.

Finally, the statutory and regulatory framework that led to Hinojosa's loss of custody credits is in flux. On June 3, 2015, the California State Senate passed S.B. 759, a bill that would repeal Section 2933.6's provision regarding credit-earning ineligibility and replace it with a requirement that the California Department of Corrections and Rehabilitation ("CDCR") establish regulations allowing specified SHU inmates to resume earning credits.[9] S.B. 759, 2015-2016 Reg. Sess. (Cal. 2015). Respondent also asks this Court to take judicial notice of the settlement in

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[9] The bill is currently pending in the California State Assembly. *See* https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201520160SB759 (last visited Feb. 26, 2016).

Ashker v. Governor of the State of California, No. 4:09-cv-05796-CW (N.D. Cal.), a federal civil-rights class action suit brought by SHU inmates regarding CDCR's gang management policies and practices, including its use of segregated housing. In the Settlement Agreement, which received final approval from the district court on January 26, 2016, CDCR agreed that it "shall not place inmates into a SHU . . . solely on the basis of their [gang] validation status." *Ashker*, No. 4:09-cv-05796-CW, Dkt. Nos. 486-3 at 4 ¶ 13 (settlement agreement), 488 (order granting final approval of class action settlement agreement) (N.D. Cal. 2016). CDCR also agreed to review the cases of all validated inmates serving indeterminate SHU terms assessed under prior regulations, and to release from the SHU those inmates who have not committed a qualifying rule violation with a proven prison gang nexus within the past two years. *Id.*, Dkt. No. 486-3 at 8 ¶ 25 (settlement agreement). This Court should decline Petitioner's request to review the constitutionality of a sentence determined by a regulatory scheme that Petitioner, as Secretary of CDCR, is in the process of revamping.

Under amended Section 2933.6, it is SHU placement, and not gang validation in itself, that triggers statutory ineligibility for custody credits. Even if Section 2933.6 remains on the books, the *Ashker* settlement means that, going forward, inmates like Hinojosa will not be precluded from earning custody credits based on gang validation alone, and amended Section 2933.6 will have no ex post facto effect. There is no need for this Court to intervene in a situation that is being addressed by California's legislative and administrative bodies.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Federal Public Defender

DATED: February 29, 2016

By: Gia Kim
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Appendix

NO. 13-56012

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANTONIO A. HINOJOSA, Petitioner-Appellant, v. CONNIE GIPSON, Respondent-Appellee.	DC NO. CR 12-965-GAF-MRW

APPELLANT'S OPENING BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

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V. ARGUMENT

Standard of Review

A. Because the California Courts Did Not Decide The Ex Post Facto Claim on the Merits, This Court Should Review This Claim *De Novo*, Without the Deference that AEDPA Requires.

This Court reviews *de novo* a district court's denial of a petition for writ of habeas corpus. *Ali v. Hickman*, 584 F.3d 1174, 1181 (9th Cir. 2009).

For purposes of federal habeas review, this Court "looks[]through the [state courts'] summary dispositions to the last reasoned decision." *McNeal v. Adams*, 623 F.3d 1283, 1287 (9th Cir. 2010). Although Mr. Hinojosa presented his ex post facto claim at every level of state habeas review, the California Court of Appeal and California Supreme Court denied his habeas petitions without comment. (ER 4, 6, 100, 182.) Therefore, the last reasoned decision in this case is the California Superior Court's decision on Mr. Hinojosa's state habeas petition. *See id.*

Contrary to the magistrate judge's conclusion, adopted by the district court, the deferential standards of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") do not apply to Mr. Hinojosa's ex post facto claim. Under AEDPA, a petitioner must demonstrate that the state court's decision "(1) . . . was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) . . . was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). But this deferential standard of

review applies only when the claim "was adjudicated on the merits in State court proceedings." *Id.* When the state courts did not reach the merits of a particular claim, "federal habeas review is not subject to the deferential standard [of Section 2254(d)]. Instead, the claim is reviewed *de novo*." *Cone v. Bell*, 556 U.S. 449, 472 (2009).

Mr. Hinojosa presented the ex post facto claim in Ground One of his Superior Court habeas petition. (ER 18.) Acting pro se, he summarized Ground One as follows: "The California Legislation Senate Bill-18, enactment of 1/25/10 to forfeited petitioner's credit earning violated petitioner plea agreement with this court and the ex post facto constitution." (ER 18.) In the body of the petition, he cited both Ex Post Facto Clauses in Article I of the United States Constitution, as well as *Weaver v. Graham*, 450 U.S. 24 (1981), and *Lynce v. Mathis*, 519 U.S. 433 (1997), leading cases on the ex post facto prohibition as applied to custody credits, and he discussed how those authorities made it unconstitutional to apply amended Section 2933.6 to his pre-enactment conduct. (ER 22, 25, 39-46.) Mr. Hinojosa also made clear that he was not challenging the underlying prison gang validation in this proceeding, as the validation was the subject of a separate state habeas petition. (ER 21, 34.) In Ground Two, Mr. Hinojosa raised due process arguments alleging that the application of amended Section 2933.6 violated his plea agreement. (ER 29, 36, 49-51.)

The Superior Court, in the California courts' last reasoned decision, never adjudicated the merits of Mr. Hinojosa's ex post facto claim. It understood Mr. Hinojosa's petition as presenting two claims. The Superior Court considered "petitioner's first claim of error," generally corresponding to Ground Two of the petition, as arguing that amended Section 2933.6 "violates the terms of petitioner's plea agreement and constitutional right to due process." (ER 1.) It denied this claim on the merits in a reasoned decision. (ER 2.) The Superior Court characterized "petitioner's second claim of error" as follows:

> **The California Department of Corrections and Rehabilitation has unlawfully validated petitioner as a prison gang associate resulting in the retroactive application of recently amended Penal Code § 2933.6 to restrict and/or deny petitioner's eligibility for prison conduct credit in violation of petitioner's constitutional right to due process and the constitutional proscription against ex post facto legislation.**

(ER 2.) It then denied this claim "on grounds petitioner has not sought review of his claim of error in the proper judicial venue." (ER 2-3.) Citing the California Supreme Court's decision in *Griggs v. Superior Court*, 16 Cal. 3d 341, 347 (1976), the Superior Court reasoned that Mr. Hinojosa's claim of improper gang validation resulting in the denial of conduct credits "is essentially a challenge to a condition of confinement that should be properly brought in the superior court of confinement" -- that is, Kings County instead of Orange County. (ER 3.)

In light of the Superior Court's bifurcated decision, which emphasized that its denial of each claim rested on "separate and independent grounds" and addressed only the plea agreement/due process claim on the merits (ER 2), the usual presumption of a merits adjudication under Section 2254(d) is either inapplicable or rebutted. In *Harrington v. Richter*, 131 S. Ct. 770 (2011), the Supreme Court held that "[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Id.* at 784-85; *see also Johnson v. Williams*, 133 S. Ct. 1088, 1096 (2013) (same). Further, "[t]he presumption may be overcome when there is reason to think some other explanation for the state court's decision is more likely." *Richter*, 131 S. Ct. at 785. Here, the presumption does not apply because the Superior Court's decision indicates that it either misconstrued Mr. Hinojosa's ex post facto claim or wrongly denied the claim on the state-law procedural ground of improper venue, not on the merits. The district court erred by concluding otherwise. (ER 9-10, 14.)

The most plausible explanation for the Superior Court's decision is that it simply misconstrued the nature of Mr. Hinojosa's ex post facto claim. The Superior Court understood the ex post facto claim as challenging the lawfulness of his underlying validation as a prison gang associate, as distinguished from amended Section 2933.6's retroactive and disadvantageous effect on his sentence

regardless of whether the earlier gang validation was proper. (ER 2-3.) The Superior Court's understanding explains why it erroneously considered Mr. Hinojosa's challenge to his sentence as "essentially a challenge to a condition of confinement." (ER 3.) Yet the gravamen of Mr. Hinojosa's petition clearly targeted the new legislation's retrospective effect on his sentence, as opposed to his conditions of confinement (ER 18, 22, 25, 39-46), and expressly disavowed any challenge to the prison gang validation (ER 34). When a state court misconstrues a federal constitutional claim fairly presented to it, the resulting decision is not deemed to be an adjudication on the merits. *See Henderson v. Cockrell*, 333 F.3d 592, 600-01 (5th Cir. 2003); *Davis v. Sec'y for Dept. of Corr.*, 341 F.3d 1310, 1313 (11th Cir. 2003) (per curiam); *Appel v. Horn*, 250 F.3d 203, 210-12 (3d Cir. 2001). AEDPA deference is therefore unwarranted.

Second, even if the Superior Court properly construed Mr. Hinojosa's ex post facto claim, its procedural ruling was erroneous and cannot bar federal habeas review. "A federal habeas court will not review a claim rejected by a state court 'if the decision of [the state] court rests on a state law ground that is independent of the federal question and adequate to support the judgment.'" *Beard v. Kindler*, 558 U.S. 53, 55 (2009) (quoting *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)). A state procedural ground is adequate if it is "firmly established and regularly followed." *Beard*, 558 U.S. at 60 (citation and internal quotation marks omitted). Here, the Superior Court viewed the ex post facto claim as "essentially a challenge

to a condition of confinement" that should have been raised in the county of confinement, not in the county of conviction. But this rule was not firmly established and regularly followed in California. To the contrary, at the time of the Superior Court's decision, a published opinion of the California Court of Appeal held precisely the opposite, that a habeas petition challenging the denial of custody credits "is not related to the conditions of . . . confinement" and was properly brought in the district of conviction. *In re Oluwa*, 255 Cal. Rptr. 35, 37 (Cal. Ct. App. 1989). The existence of a published appellate case refuting the Superior Court's conclusion demonstrates that the procedural rule it relied on was inadequate to foreclose federal habeas review. *See Scott v. Schriro*, 567 F.3d 573, 581-82 (9th Cir. 2009).

Finally, the Superior Court's procedural ruling was inadequate for another reason. The Superior Court paraphrased *Griggs*'s holding as follows: "Challenges to conditions of an inmate's confinement should be entertained by the superior court of the county wherein the inmate is confined." (ER 3[citing 16 Cal. 3d at 347].) But what *Griggs* actually holds is that "[i]f the challenge is to conditions of the inmate's confinement, then the petition *should be transferred* to the superior court of the county wherein the inmate is confined if that court is a different court from the court wherein the petition was filed." *Id.* (emphasis added). The Superior Court made no mention of transferring Mr. Hinojosa's petition and instead simply denied it. (ER 2-3.) *Griggs* itself shows that the Superior Court's disposition of

the ex post facto claim -- denial, instead of transfer -- relied on a procedural rule that was not firmly established and regularly followed. A state court's erroneous denial on procedural grounds means there is no state court decision on the merits, and the federal court must review the merits *de novo*. *See Scott v. Ryan*, 686 F.3d 1130, 1133 (9th Cir. 2012).

For any and all of the foregoing reasons, the ex post facto claim is not subject to Section 2254(d)'s deferential standard applicable to state-court adjudications on the merits. This Court's review is therefore *de novo*.

Discussion

B. On *De Novo* Review, This Court Should Grant Habeas Relief Because the Amendment to Section 2933.6 Violates the Ex Post Facto Clause.

The Constitution provides that "No State shall . . . pass any . . . ex post facto Law." U.S. Const., art. I, § 10, cl. 1; *see also id.* at art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."). Found twice in the Constitution, the ex post facto prohibition ensures that "legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed" and also "restricts governmental power by restraining arbitrary and potentially vindictive legislation." *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981). Put differently, the Ex Post Facto Clause "places limits on the sovereign's ability to use its lawmaking power to modify bargains it has made with its subjects." *Lynce v. Mathis*, 519 U.S. 433, 440 (1997).

13-56012

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANTONIO HINOJOSA,

Petitioner and Appellant,

v.

CONNIE GIPSON, Warden,

Respondent and Appellee.

On Appeal from the United States District Court
for the Central District of California

No. SACV 12-965 GAF (MRW)
Honorable Gary A. Feess, Judge

RESPONDENT-APPELLEE'S BRIEF

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as prison gang members and are housed in a security housing unit (SHU) were ineligible to earn credits pursuant to California Penal Code sections 2933 or 2933.5. As a result, Hinojosa, a validated prison gang associate confined in the SHU, has been ineligible to earn conduct credits since that date.

C. Habeas corpus proceedings in the California courts

Hinojosa did not file a direct appeal. His actions in the California courts were limited to the filing of habeas corpus petitions.

Hinojosa's habeas corpus petition in the Orange County Superior Court, claiming that application of the credit restrictions violated his plea agreement and the right to due process, and that the California Department of Corrections and Rehabilitation (CDCR) incorrectly validated him as a gang member, resulting in the restrictions on his good time credits was rejected. The court ruled that there was no violation of the plea agreement since the plea agreement did not contain an express promise or guarantee that Hinojosa would earn fifteen percent conduct credit regardless of subsequent events that might occur while he was serving his sentence, and that the trial court was not required to inform Hinojosa of the possibility of future changes to the law that might adversely impact him. The court also ruled that as to the claim of error in validating him as a gang member,

Hinojosa did not avail himself of the relief he could have by filing a habeas petition in the county where he was being held. (1 ER 1-3.)

Hinojosa's subsequent habeas corpus petitions in the California Court of Appeal and the California Supreme Court, raising this claim, were denied without comment. (1 ER 4-6.)

Hinojosa filed a federal habeas petition raising his claim. On March 28, 2013, the Magistrate Judge, Honorable Michael R. Wilner, filed a Report and Recommendation recommending the denial of relief. The report stated:

> The Ex Post Facto Clause prohibits the enactment of a law that punishes an act not punishable at the time it was committed, or imposes additional punishment than prescribed when the act was committed. For a law to violate the ex post facto prohibition, "it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." Weaver v. Graham, 450 U.S. 24, 29 (1981). A change in the law is disadvantageous if it is "more onerous than the law in effect on the date of the offense. Id. at 30-31. A statute that retroactively revokes previously-awarded credits violates the Ex Post Facto Clause, as it has "the effect of lengthening [the prisoner's] period of incarceration." Lynce v. Mathis, 519 U.S. 433, 443, 447 (1997) (statute "did more than simply remove a mechanism that created an opportunity for early release") (emphasis in original).
>
> To date, no federal court has found Section 2933.6 to be unconstitutional. See, e.g., *Corral v. Gonzalez*, No. CV 12-1315 LJO (SKO), 2013 WL 635933 (E.D. Cal. Feb. 20, 2013); Smith v. Holland, No. CV 12-1529 BAM, 2012 WL 5387366 (E.D. Cal. Nov. 1, 2012); Munoz v.

members and housed in a security housing unit (SHU) constitutes a violation of ex post facto principles The statute does not. The decisions of the California courts are entitled to deference.

ARGUMENT

I. THE CALIFORNIA COURTS ADDRESSED THE CLAIM REGARDING A VIOLATION OF EX POST FACTO PRINCIPLES IN REGARDS TO THE AMENDMENT TO CALIFORNIA PENAL CODE §2933.6.

Respondent first addresses the claim made by Hinojosa that the California courts's decisions did not address on the merits the claim of a violation of ex post facto principles and, therefore, this Court should review the matter *de novo*. According to Hinojosa, the trial court had decided two issues: one regarding a violation of the plea agreement, and the other based on due process, but never the ex post facto claim. (AOB 16-22.) Hinojosa also claims that because of this, this Court may address the claim without finding that *Barnes* is binding precedent. (AOB at 24.) is wrong. The claim was addressed by the California courts, and deference under AEDPA is required.

Hinojosa raised two claims in his state habeas corpus petition in the California Supreme Court. In his petition he argued that the new credit provisions constituted a violation of ex post facto principles and due process because it violated his plea agreement. (2 ER 16-27, specifically, 2 ER 22 (title of argument) and 27, section 15.)

The trial court correctly denied that claim. Although it utilized language that referred to the plea agreement and due process (1 ER 1), its analysis as to how the new credit provisions did not violate the plea agreement, by necessity, resolved the ex post facto argument since it involved the denial of future credits while Hinojosa was in prison and under the amended state statute. *See Johnson v. Williams*, __ U.S. __, 133 S. Ct. 1088, 1096 (2013) ("When a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits—but that presumption can in some limited circumstances be rebutted.")

Any criticism that the California courts failed to use either express language with the term "ex post facto" or even cite to the leading Supreme Court authorities on ex post facto laws lacks merit. State courts are not required to cite, let alone be aware of, existing United States Supreme Court precedent "so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam). Rather, Hinojosa must "show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement." *Richter,* 131 S. Ct. at

786-87. He has failed to do so. Here, the result of the denial by the trial court, and the resultant silent denials in the California Court of Appeal and California Supreme Court, are entitled to deference, particularly where the result is not contrary to Supreme Court precedent.

II. *NEVAREZ V. BARNES*, 749 F.3D 1124, IS CONTROLLING PRECEDENT IN THIS CASE. THE CLAIM HERE MUST BE REJECTED.

The Ninth Circuit, in *Barnes*, 749 F.3d 1124, found there was no violation of ex post facto principles due to the amendment of California Penal Code §2933.6. In *Barnes*, the petitioner received a twelve-year prison sentence. Later, while in prison, he was convicted of bringing marijuana into prison, and received an additional three-year sentence. Afterwards, he was validated as an associate of the Mexican Mafia prison gang and was assessed an indeterminate term in the security housing unit. At the time, California law stated that the petitioner was eligible to earn one day of good conduct credit for every two days served. Later, California Penal Code §2933.6 was amended to deny conduct credits for inmates who are housed in a security housing unit and are validated gang affiliates. After the state courts denied relief on the claim of a violation of ex post facto principles, the petitioner went to federal court where he lost as well. The Ninth Circuit held that the fact that amended California Penal Code §2933.6 applied only

No. 15-833

IN THE

Supreme Court of the United States

JEFFREY BEARD, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION,

Petitioner,

v.

ANTONIO A. HINOJOSA,

Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

CERTIFICATE OF SERVICE

I, Gia Kim, a Deputy Federal Public Defender in the Office of the Federal Public Defender who was appointed as counsel for Respondent under the Criminal Justice Act, 18 U.S.C. § 3006(A)(b), do swear or declare that on February 29, 2016, as required by Supreme Court Rule 29, I served the enclosed Motion for Leave to Proceed in Forma Pauperis and Brief for Respondent in Opposition on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents with Federal Express for first overnight delivery.

The names and addresses of those served are as follows:

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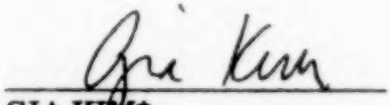
Counsel for Petitioner

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 29, 2016.



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February 29, 2016

Office of the Clerk
Supreme Court of the United States
One First Street, North East
Washington, DC 20543

Re: *Jeffrey Beard, Secretary, California Department of Corrections and Rehabilitation, Petitioner v. Antonio A. Hinojosa, Respondent*
Supreme Court No. 15-833

Dear Sir/Madam:

Enclosed please find an original and 10 copies of Respondent's (1) Motion for Leave to Proceed In Forma Pauperis, (2) Brief for Respondent in Opposition, (3) Appendix, and (4) Certificate of Service.

Also enclosed is a copy of the cover page of the Motion for Leave and the Brief for Respondent in Opposition. For proof of filing, kindly stamp these pages and return them to us in the enclosed postage prepaid envelope.

Respectfully submitted,

Gia Kim

GIA KIM
Deputy Federal Public Defender
Counsel of Record

Encl.
GK/mb